U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Apr2002

CASE NOS: 2002-CAA-8
2002-CAA-12
2002-CAA-14

In the Matter of:

DAVID L. LEWIS
Complainant

v.

SYNAGRO TECHNOLOGIES, INC.,
ROSS M. PATTEN, and ROBERT O'DETTE
Respondents

RECOMMENDED DECISION AND ORDER

On February 11, 2002 and February 21, 2002, complainant, an employee of the Environmental Protection Agency (EPA) working at the University of Georgia (UGA), filed complaints alleging that Synagro and two individual officers of Synagro, Ross M. Patten and Robert O'Dette, engaged in discriminatory acts of retaliation against him in violation of various environmental whistleblower statutes, including the Clean Air Act, 42 U.S.C. 7622, (CAA); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, (CERCLA); the Safe Drinking Water Act, 42 U.S.C. 300j-9, (SDWA); the Solid Waste Disposal Act, 42 U.S.C. 6971, (SWDA); and the Toxic Substance Control Act, 15 U.S.C. 2622, (TSCA). [1] On February 14, 2002, and February 27, 2002, the claims were dismissed by the OSHA Regional Administrator on the basis that the alleged adverse employment action was not consistent with the DOL's legal interpretation of what constitutes an adverse employment action.

By letters dated February 24, 2002 and March 3, 2002, complainant's counsel requested a hearing before an administrative law judge. Complainant filed a Motion to Compel Discovery on March 14, 2002. On March 18, 2002, counsel for the respondents filed a combined Motion to

[1] Complainant asserts in his brief that his claim is under six environmental protection laws. He further states that Synagro concedes to the applicability of the Water Pollution Control Act (WPCA). A review of the OSHA decision of record reveals that the complainant did not file a discrimination complaint under the WPCA.

Dismiss, Motion to Strike Discovery Pleadings, and Opposition to Motion to Compel. On March 22, 2002, complainant requested that the reply to respondents' March 18, 2002 motions be extended until April 8, 2002. Complainant filed a reply brief on April 10, 2002.

Complainant is a research scientist employed by the EPA at its Athens, Georgia research laboratory. Currently, complainant is working at UGA on an Intergovernmental Personnel Act Assignment through the EPA and UGA. During his tenure at UGA, complainant participated as the lead expert witness for the plaintiffs in a private tort suit brought against respondent Synagro, a company dealing in biosolids, in New Hampshire state court. Sometime after the lawsuit ended, Synagro sent a letter to the EPA regarding its position on biosolids and questioning complainant's role in the lawsuit. Furthermore, Synagro's Vice President, respondent Robert O'Dette, replied to an email from a farmer inquiring about the lawsuit.

2002-CAA-12 & 2002-CAA-14

Respondents move to dismiss complainant's complaints on the following three grounds: (1) the court lacks jurisdiction over the complaints; (2) the complainant fails to make a *prima facie* case; and (3) respondents' actions are protected under the Petition Clause of the First Amendment.

The rules of practice and procedure applicable to administrative hearings under the environmental whistleblower statutes do not contain a section regarding motions to dismiss. *See* 29 C.F.R. Part 18. Section 18.1(a) states that in situations not provided for under Part 18, the Federal Rules of Civil Procedure apply. 29 C.F.R. 18.1(a). Federal Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The courts have recognized two types of 12(b)(1) motions. A "facial" 12(b)(1) motion questions the sufficiency of the pleading; that is, when the facts as stated supposedly do not provide cause for federal jurisdiction, the court takes the allegations in the complaint as true. A "factual" motion questions the very facts providing cause for jurisdiction. In a factual attack no presumption of truthfulness applies and the court is allowed to consider the facts as it sees fit. *Barnett v. Okeechobee Hospital*, 2002 WL 261950, C.A. 11 (Fla) 2002.

Respondents have made a "facial" jurisdictional challenge. It is axiomatic that the burden of establishing jurisdiction is on the plaintiff. *Reid v. Methodist Medical Center*, 93-CAA-4 (Sec'y. April 3, 1995) (citing *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). A complainant's failure and inability to plead facts establishing jurisdiction commands dismissal. *Id.*

Respondents move to dismiss the complainants because the relationship between complainant and respondents is not an employee-employer relationship. Complainant asserts that there are three situations in which an employment relationship exists: (1) a direct common law employment relationship; (2) a joint employment relationship; and (3) an employment relationship based on the respondent's actions to interfere with the complainant's employment. In the instant complaints, complainant asserts that the third type of employment relationship exists.

The Secretary of Labor in *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y. April 13, 1995), held that the complainant and respondent must satisfy the common law test for employee, which was adopted by the Supreme court in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992), to establish the DOL's jurisdiction in environmental whistleblower provisions. [2] Complainant has not alleged any facts in his complaint that he was directly employed by Synagro or its two named individual officers. The pleadings clearly reveal that complainant does not qualify as an employee under the common law test because Synagro and its individually named officers do not control such factors as the time, manner, or context of his employment.

The Supreme Court in *Radio & Tel. Broadcast Technicians v. Broadcast Serv.*, 380 U.S. 255 (1965), set the criteria for finding a joint employer relationship. Several nominally separate business entities are considered to be a single employer where there are interrelations of operations, common management, centralized control of labor relations, and common ownership. *Id* at 256. The pleadings clearly indicate that not a single factor in *Radio & Tel. Broadcast* is satisfied in the instant complaints.

Complainant alleges that respondents acted as an employer by interfering with his employment. Complainant relies on *Hill v. TVA*, 87-ERA-23 and 24 (Sec'y Dec. and Ord. of Remand, May 24, 1989) and *Stephenson v. NASA*, 94-TSC-5 (ARB, July 18, 2000), for this proposition.

The complainants in *Hill* were former employees of the Quality Technology Company (QTC). QTC had a contract with respondent, Tennessee Valley Authority (TVA), a licensee of the Nuclear Regulatory Commission (NRC), to develop and implement a program for the identification, investigation, and reporting of respondent's employees' concern regarding safety issues at TVA's nuclear power plants. Complainants alleged that TVA violated the ERA by restricting the scope of its

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[2] The common law test for employee is:

> In determining where a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
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> *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 323 (1992) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

contract with TVA and ultimately terminating employment, in retaliation for complainants' investigation and disclosure of safety violations in TVA's nuclear power program. *Hill v. TVA*, 87-ERA-23 and 24 (Sec'y Dec. and Ord. of Remand, May 24, 1989). After reviewing the legislative history of the ERA, the Secretary determined that under the specific facts of the case, the complainants may file suit against TVA. *Id.*

In *Stephenson*, complainant was an employee of Martin Marietta Corporation (Martin) and worked at the Johnson Space Center in Texas under Martin's contract with respondent, National Aeronautics and Space Administration (NASA). Complainant filed complainant against NASA and Martin alleging that NASA prevented her from doing her job in retaliation for complaining about the safety of a certain chemical used aboard the space shuttle. *Stephenson v. NASA*, 94-TSC-5 (ARB, July 18, 2000). The Administrative Review Board explained that, depending upon specific facts of a case, an employment relationship may exist where an entity, albeit not a direct or immediate employer, is nonetheless a covered employer. *Id*.

The employment relationship in *Hill* and *Stephenson*, which extends liability beyond common law employers, applies in limited circumstances. In both these cases, the complainants were common law employees of companies who contracted for the respondents. To establish that a named party respondent who is not the complainant's immediate, common-law employer is nevertheless a covered "employer" for purposes of liability under the CAA, a successful complainant must establish the existence of a "relevant nexus" between the respondent in question and the complainant's immediate employer. *Williams v. Lockheed Martin Energy Systems, Inc.* (ARB Jan. 31, 2001) (citing *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (ARB June 14, 1996).

In the instant complaints, there is not a "relevant nexus" between the EPA and respondent Synagro. Complainant is a common-law employee of the EPA. Synagro is a full service provider of residuals management services, including the land application of biosolids. Synagro, like other entities pursuing activities that affect the environment, are subject to EPA regulations. This is not a relevant nexus to establish Synagro as a covered employer for purposes of liability under the CAA. Unlike the respondents in *Hill* and *Stephenson*, Synagro is not a contracting agency with the capability of controlling or changing the terms, conditions, compensation, or privileges of complainant's employment. Therefore, an employment relationship does not exist between complainant and Synagro, or its officers.

Complainant next argues that the CERCLA and SWDA are broader in liability because they prohibit a "person" from discharging or discriminating against an employee. [3] He asserts that these statutes are broader than the statutes that use the term "employer", as they contain no employer-employee requirement. This statement is clearly erroneous. The Secretary of Labor has held that individuals are not covered "persons" under the environmental whistleblower provisions unless they are also employers within the meaning of the applicable statutes. *Stephenson v. NASA*, 94-TSC-5 (Sec'y July 3, 1995); *See also Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (ARB June 14, 1996). Respondents Robert O'Dette and Ross M. Patten do not employ complainant and therefore cannot be liable under these statutes.

Complainant further cites to dicta in *Stephenson* for the proposition that high officials in corporations that are employers may be liable when they act in a way consistent with an "employer". 94-TSC-5 (ARB July 18, 2000). Dicta in *Stephenson* states:

> A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions, or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer . . .
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> *Stephenson v. NASA*, 94-TSC-5 (ARB July 18, 2000).

Although the ARB's dicta in *Stephenson* may extend liability to corporate individuals, the dicta discussion does not apply in the instant complaints. Respondent Synagro is not a covered employer under the environmental whistleblower provisions and individual respondents O'Dette and Patten's alleged actions towards complainant were not consistent with that of an employer. As stated previously, liability under the applicable statutes does not extend to O'Dette and Patten.

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[3] § 9610 of CERCLA provides in pertinent part:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminate against, any employee or authorized representative of employees . . .
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> 42 U.S.C. § 9610(a) (1988).

The SWDA whistleblower provision is similar to the CERCLA provision. 42 U.S.C. § 6971(a) (1988).

Respondents next argue that complainant failed to establish a *prima facie* case and the complaints should be dismissed under the Federal Rule of Civil Procedure 12(b)(6). Complainant cites the United States Supreme Court case of *Swierkiewcz v. Sorema*, 122 S.Ct. 992 (2002), holding that a complaint in an employment discrimination lawsuit need not plead specific facts establishing a *prima facie* case of discrimination, but must contain only a short and plain statement of the claim showing that the pleader is entitled to relief. *Id*.

In the instant complaints, respondents move for dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim for which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The difference between a 12(b)(1) motion and a 12(b)(6) motion is that the 12(b)(6) motion involves a ruling on the merits of the complaint. A 12(b)(1) motion involves a procedural defect in the claim, specifically, if the court has the authority to hear the case. In a 12(b)(6) motion, the moving party has the burden of showing there are no genuine issues as to any material facts, and if the court considers matters outside the pleadings, the motion will be treated as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. To the contrary, where subject matter jurisdiction is challenged under 12(b)(1), the plaintiff has the burden of proving jurisdiction. *See Barnett v. Okeechobee Hospital*, 2002 WL 261950, C.A. 11 (Fla) 2002; *See also RMI Titanium Co. v. Westinghouse Electric Corp*, 78 F.3d 1125, 1134 (6th Cir. 1996) (citing *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 890 (3rd Cir. 1977)).

In order for this court to rule on the merits of these complaints, the court must first have jurisdiction to hear the complaints. Since the complainant has failed to establish an employment relationship with respondents, this court does not have jurisdiction to hear the complaints. As there is no jurisdiction to hear the complainants, respondents' 12(b)(6) motion and the issue of whether respondents' conduct is protected under the Petition Clause of the First Amendment will not be addressed.

Because it has been established that this court does not have jurisdiction over complainant's complaints filed against respondents, respondents' Motion to Dismiss and Motion to Strike Discovery Pleadings is granted and complainant's Motion to Compel Discovery is denied.

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On March 13, 2002, complainant submitted a letter stating that in December 2001 complainant and respondent Synagro reached a settlement agreement. Complainant formally withdrew the complaint before OSHA. Therefore, this complaint is not currently before the Office of Administrative Law Judges. Accordingly, the complaint is dismissed.

ORDER

IT IS ORDERED that 2002-CAA-8 is DISMISSED.

IT IS FURTHER ORDERED that respondents' Motion to Dismiss the Complaints is GRANTED.

IT IS FURTHER ORDERED that respondents' Motion to Strike Discovery Pleadings is GRANTED.

AND IT IS FURTHER ORDERED that complainant's Motion to Compel Discovery is DENIED.

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DANIEL L. LELAND
Administrative Law Judge

DLL/es/lab

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8. a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties, and on the Chief Administrative Law Judge, the Assistant Secretary, Occupational *Sa*fety and Health Administration, and the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. §§ 24.7(d) and 24.8.